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Supreme Court, U.S.
FILED

No. 98- 981988 JUN 11 1999

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IN THE

Supreme Court of the United States

DOROTHY E. SWAINSTON, BY AND FOR HERSELF AND AS EXECUTRIX OF THE GEORGE D. SWAINSTON ESTATE AND TRUSTEE OF THE GEORGE D. SWAINSTON FAMILY TRUST, WAYNE D. WRIGHT AND NADIA WRIGHT,

Petitioner,

v.

R.. MICHAEL TURNIPSEED, NEVADA STATE ENGINEER, AND DOUBLE JA LAND AND LIVESTOCK COMPANY, INC., A NEVADA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

May a state's highest court characterize a body of property law such as Nevada's water law as "special in character" so that it may disregard important United States Supreme Court precedents and the specific application of such precedents in the resolution of federal constitutional questions pertaining to the notice and opportunity to be heard concepts of the Fourteenth Amendment's Due Process Clause?

II.

Does notice by publication provide adequate individualized notice of the pendency of a state administrative protest proceeding for an application for a large irrigation well so that nearby property owners are barred as a matter of law from a district court remedy?

PARTIES INVOLVED

A list of the parties who participated in the appeal to the Nevada Supreme Court whose Order Dismissing Appeal is sought to be reviewed appear in the caption of the case reproduced at pp. 1a to 5a of Appendix A.

The petitioners before this Court are Dorothy E. Swainston, by and for herself and as Executrix of the George D. Swainston Estate and Trustee of the George D. Swainston Family Trust, Wayne D. Wright and Nadia Wright. The Petitioners are the elderly owners of two small family farms, 135 and 80 acres, in Smith Valley, Nevada. They were the appellants in all of the court proceedings below.

The respondents are R. Michael Turnipseed, Nevada State Engineer, and Double JA Land & Livestock Company, Inc., a Nevada Corporation. The Nevada State Engineer is an appointed State official. He is the administrative director of the Nevada Division of Water Resources. Double JA Land & Livestock Company, Inc., is a large land owner with holdings in Smith Valley, Nevada and Jacks Valley, Nevada.

The parent company and wholly owned subsidiaries of Double JA Land & Livestock Company, Inc., if any, are not known. It appears from the record, however, that the initials Double JA (JJA) stand for John J. Ascuaga, the principle owner of John Ascuaga's Nugget (a hotel-casino complex) in Spark's Nevada. The address for Double JA Land & Livestock Company, Inc., is the same as that for John Ascuaga's Nugget and therefore it is assumed that there is a business relationship between the two entities.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioners, Dorothy E. Swainston, Wayne D. Wright and Nadia Wright, respectfully pray that a writ of certioari issue to review the Order Dismissing Appeal of the Supreme Court of Nevada entered in this proceeding on March 25, 1999.

OPINIONS BELOW

The opinion of the Nevada Supreme Court whose judgment is sought to be reviewed, denominated Order Dismissing Appeal, is reproduced at pp.1 to 5a of Appendix A. It is unreported at this time. A Motion For Publication of Order Dismissing Appeal filed by Respondent Double JA Land & Livestock on or about April 1, 1999, is pending.[1] The Order Granting Motion For Summary Judgment of the Third Judicial District Court of the State of Nevada entered on January 8, 1997, is not reported. It is set forth in Appendix B at pp. 6a to 15a. The Nevada State Engineer's Ruling No. 3854, entered in the records of his office on December 10, 1991, which was the subject of the Petitioners' Notice of Appeal to the District Court is set forth in Appendix C at pp. 16a to 22a.

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[1] Respondent Double JA Land & Livestock urged as grounds for cause in its Motion For Publication Of Order Dismissing Appeal:

> To the best of Movant's knowledge, information and belief, there is at present no published decision of this Court construing the 30-day deadline of NRS §533.450 (1997) for filing of applications for judicial review of, or of appeal from, orders of the State Engineer to be mandatory and jurisdictional, and holding that failure to observe that deadline is a proper basis for summary judgment dismissing such applications or appeals. The Order so holds.

JURISDICTION

The Order Dismissing Appeal of the Nevada Supreme Court was entered on March 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Petitioner's Petition For A Writ Of Certiorari To the Supreme Court of Nevada was timely filed.

CONSTITUTIONAL PROVISIONS AND APPLICABLE STATUTES

Section 1 of the Fourteenth Amendment is set forth as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following Nevada Revised Statutes are involved in this case:

NRS 533.040(1)
NRS 533.360
NRS 533.365.
NRS 533.370(3)
NRS 533.450

They are reproduced in Appendix E, pp.39a to 43a.

STATEMENT OF THE CASE

In 1977 the Nevada State Engineer denied Respondent Double JA Land & Livestock Company, Inc., (hereinafter Respondent Double JA) a permit to appropriate underground water on Double JA property in Smith Valley, Nevada, a rural, agricultural valley, on the grounds that it would interfere with existing rights and prove to be detrimental to the public interest. The denial was affirmed by the Third Judicial District Court for the State of Nevada in *Double JA Land & Livestock Co. v. Roland B. Westergard, State Engineer,* Case No. 6131, filed on July 18, 1977 (the Decision and Judgment is reproduced in Appendix D at pp.23a to 38a). Having failed to acquire a permit for a new appropriation, Respondent Double JA agreed to purchase existing water permits from Josephine Casebolt if they could be transferred for use on Double JA land. On February 14, 1991, Josephine Casebolt, the owner of two water permits[2] in Smith Valley, Nevada, filed Application Nos. 55840 and 55841 with the State Engineer to change the point of diversion and place of use of the permits to lands owned by Respondent Double JA. The filing fees were paid for by John Ascuaga, owner of Respondent Double JA, on Casebolt's behalf. After the initial filing, Josephine Casebolt made no appearance in the administrative or court proceedings below.

From April 12 to May 10 of 1991 the State Engineer caused five notices of each of the two Casebolt applications to be published in a weekly newspaper, the Mason Valley News, a newspaper of general but limited circulation having as its

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[2] Permit 49446 (Certificate No. 12095) and Permit 49447 (Certificate No. 12096).

major focus, news of Mason Valley, Nevada[3], another rural, agricultural valley adjoining Smith Valley, Nevada. The notices were defective in their failure to identify Respondent Double JA's land as the new place of use of the water rights being sought to be transferred.[4] The State Engineer granted the permits by Ruling No. 3854, dated December 10, 1991. In Ruling No. 3854 the State Engineer made no reference to the 1977 State Engineer's ruling affirmed by the *Double JA Land & Livestock Co. v. Westergard, supra,* case which held

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[3] A declaration appearing on the front page of the Mason Valley News states: "The Only Newspaper In The World That Gives A Damn About Yerington." Yerington is the largest town in Mason Valley.

[4] The State Engineer's Notices were sent to the Mason Valley News in the following form:

APPLICATION FOR PERMISSION TO CHANGE
THE POINT OF DIVERSION AND PLACE OF
USE OF THE PUBLIC WATERS OF THE STATE OF NEVADA
HERETOFORE APPROPRIATED

Application No. 55840

NOTICE IS HEREBY GIVEN, that on the 14th of February, 1991 Josephine Casebolt of Wellington, Nevada made application to the State Engineer of Nevada for permission to change the point of diversion and place of use of 1.32 c.f.s. of water heretofore appropriated under Permit No. 49446, Certificate 12095. Water will be diverted from an underground source at a new point located within the SE¼ SE¼ of Section 24, T.11N., R.23E., M.D.B.&M., or at a point from which the E¼ corner of Section 25, T.11N., R.23E., M.D.B.&M., bears S 01° 12' 19"E a distance of 2666.97 feet. Water will be used for irrigation & domestic purposes from January 1st to December 31st of each year. The existing point of diversion was from an underground source located within the NW¼ NE¼ of Section 3, T.11N., R23E., M.D.B.&M. or at a point from which the SW corner of said Section 3, bears S 33° 49' 06" W., a distance of 4799.2 feet.

Signed:
R. Michael Turnipseed P.E.
State Engineer

that the extraction of underground water on Respondent Double JA land would intercept ground water which serves to recharge the West Walker River, an interstate stream, the water rights to which were adjudicated by the United States District Court for Nevada in a case styled: *United States v. Walker Irrigation District, et al.* In Equity, No. C-125 (1935). As demonstrated by the State Engineer's 1977 ruling, the withdrawal of groundwater under the permits resulting from the Casebolt applications will intercept water flowing subsurface to the West Walker River. App. at 27a-28a. At Casebolt's point of diversion prior to the transfer, the flow of the West Walker River was not affected, as the well was in a northern subbasin whose groundwater gradient was away from the River (toward Artesia Lake).

The Petitioners have surface water rights for irrigation recognized in the United States District Court decree which are affected by the diminished flow of the West Walker River because senior appropriators downstream can and do cause the ditch diversions which supply water to the Petitioners' farms to be reduced to service their senior water rights, particularly in short water years and times of drought. Operation of Respondent Double JA's irrigation well dewaters the subsurface under Petitioner's land in a cone of depression which extends to Petitioners' domestic and stockwatering wells and reduces both quality and quantity of the water in the wells.

The Petitioners first became aware that a large irrigation well[5] would be located within one-third mile of their domestic and stockwatering wells when the erection of a well rig was

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[5] The well driller reported the size of the well to the Nevada Division of Water Resources as 30 inches in diameter to a 128 foot depth with a 26 inch casing and 24 inches in diameter to a 760 foot depth with a 16 inch casing.

commenced across Petitioners Wrights' fence line on Double JA land at the end of March 1992. An inquiry to the Nevada Division of Water Resources produced a copy of the State Engineer's Ruling approving the construction of the well. The Ruling rejected three protests which had no bearing on Petitioner's interests. On April 15, 1992, the Petitioners filed their Notice of Appeal, challenging the State Engineer's ruling, with the Third Judicial District Court of the State of Nevada pursuant to Nevada Revised Statutes (NRS) 533.450.

1. District Court Decision

Early in the proceedings below the Petitioners raised the federal constitutional due process issue of adequate notice. By the time they were put upon inquiry notice by the appearance of the well rig on John Ascuaga's Double JA land, the 30-day limitation period for filing an appeal to the District Court contained in NRS 533.450 had elapsed. Notwithstanding the elapse of the 30 days, their only remedy to protect their interest from the effect of the Respondent State Engineer's ruling under Nevada water law was an action in the nature of an appeal provided in NRS 533.450. *See e.g., Jahn v. District Court,* 58 Nev. 204, 210-211, 73 P.2d 499, 502 (1937). In their Notice of Appeal of the State Engineer's ruling, the Petitioners alleged at page 2:

> The Appellants were given no actual or constructive notice of the entry of the State Engineer's Ruling No. 3854 in the records of his office. Appellants were put on inquiry notice of the existence of a new permit to divert water on John Ascuaga's property when John Ascuaga began work in preparation for constructing an irrigation well on his property. An inquiry to the State Engineer's office produced Ruling No. 3854.

> Notice by publication of Josephine Casebolt's applications was defective in providing Appellants of actual or constructive notice of a transfer of the beneficial use of water rights owned by Josephine Casebolt on lands owned by her to John Ascuaga on lands owned by him.
>
> Conditions and circumstances surrounding a controversy concerning the effect of underground diversions of water in the vicinity of Appellants' properties demanded that the best notice of the pendency of the proceedings which resulted in State Engineer's Ruling No. 3854 be provided to Appellants so that they would be afforded an opportunity to be heard. Nothing short of actual notice, which was not provided, would have been sufficient for this purpose.

The State Engineer filed Appellee's Motion To Dismiss on May 15, 1992, stating that the "Appellants never filed their appeal of Ruling No. 3854 until April 15, 1992, some 127 days following the rendition of the decision in question." The State Engineer argued that: "Appellants' failure to follow NRS 533.450(1), the statutory procedure for appealing decisions of the State Engineer, denies this Court subject matter jurisdiction." Petitioners responded in Appellants' Memorandum Of Points And Authorities In Opposition To Appellee's Motion To Dismiss, filed May 29, 1992, at page 6:

> If the 30-day limitation period were strictly enforced, persons could be deprived of their property interests in water proceedings without the notice and opportunity to be heard which is the cornerstone of due process. See e.g. *Goss v. Lopez*, 419 U.S. 565 (1975). This is such a case. Appellants have a legitimate claim of entitlement to continued access to water beneath their land which may be characterized as a protected property interest. See *Goss v. Lopez*, at 573, 574. The Fourteenth

> Amendment Due Process Clause protects the Appellants' interests "against the State and all of its creatures" the State Engineer not excepted. *Id.* at 574.

The Petitioners, citing legal authority, described their vested property interests in the water which they had established for irrigation and domestic purposes. *Id.* at pp. 7-8. At page 10, they cited *Mullane v. Central Hanover Bank,* 339 U.S. 306 (1960) and *Goss v. Lopez,* 419 U.S. 565, 579 (1975) for the following proposition:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest" *Mullane v. Central Hanover Trust Co.*, *supra*, at 314.

The District Court denied the State Engineer's motion on October 22, 1992, in its Order Denying Motion To Dismiss, stating at pages 4-5:

> In the instant case, whether or not this Court has jurisdiction depends upon when the 30-day time limit began to run. Appellants' appeal is based upon the argument that they did not receive adequate notice of the hearing which led to Ruling No. 3854. In order for the court to determine whether or not it has subject matter jurisdiction, it must decide if appellants had adequate notice of the State Engineer's proceedings. Where, as here, the factual findings are intertwined with the merits, the case should not be dismissed for lack of subject matter jurisdiction.

The District Court's denial of the motion to dismiss set the stage for a hearing on the merits provided for in NRS 533.450. The time for the hearing was set for January 14,

1997. In preparation for the District Court hearing, the parties fully briefed the jurisdictional issue as well as the merits of the case in 1996. In their briefs the Petitioners, responding to the State Engineer's notice arguments, enlarged their reliance on decisions of this Court as the following excerpt from Appellant's Reply Brief at page 13, shows:

> The State Engineer's notions of due process are out of step with opinions published by the United States Supreme Court and the Nevada Supreme Court. The Appellants will point out the State Engineer's errors in his application of due process standards to the circumstances of this case.
>
> Appellants begin with the quintessential case of *Schroeder v. City of New York,* 371 U.S. 208 (1962). The case was a water case in which the City of New York instituted proceedings to acquire the right to divert a portion of a river some 25 miles upstream from Mrs. Schroeder's summer home which was on the bank of the river. Although Mrs. Schroeder's name and address could easily have been ascertained from deed records and tax rolls, no attempt was made to give notice to her except by publication in newspapers and by posting notices on trees and poles along the river. Mrs. Schroeder, like the Appellants herein, alleged that she had no actual knowledge of the proceedings until after the statutory period for filing damage claims had expired. The United States Supreme Court held that the newspaper publications and posted notices did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires and reversed the lower state courts which had held that she was barred by the limitations period. Relying upon the teachings of *Mullane, supra,* the Court stated at 212-13:

> The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.
>
> The Court also cited *Walker v. Hutchinson City,* 352 U.S. 112 (1956) for the specifically relevant application of the rule stated in the *Mullane* case. The Court stated that New York City was constitutionally obliged to make a good faith effort to give personal notice to Mrs. Schroeder—"an obligation which the mailing of a single letter would have discharged." *Id.* at 214. *See also, Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 798-800 (1983) (quoting *Mullane*, 339 U.S. at 314); *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485-91 (1988). [Footnotes omitted.]

The January 14, 1997, District Court hearing on the merits was not conducted. On October 3, 1996, the State Engineer filed a motion for summary judgment, again contending that the District Court lacked subject matter jurisdiction because the Petitioners had not filed their notice of appeal within 30-days of the issuance of the State Engineer's Ruling No. 3854, dated December 10, 1991, the same basis that the State Engineer relied upon in support of his motion to dismiss. The Petitioners responded to the State Engineer's motion in Appellants' Memorandum of Points And Authorities In Opposition To The State Engineer's Motion For Summary Judgment substantially the same way they did in their briefs on the merits. *Schroeder v. City of New York,* 371 U.S. 208 (1962), identified as the controlling precedent, was principally relied upon at page 10 of the Memorandum. They observed at page 17 of their memorandum that this

Court recognized in *Mullane v. Central Hanover Trust Co., supra,* at 320 that:

> Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

A list of material factual matters in dispute was provided in Petitioners' brief at pages 5-7, which they urged, made summary judgment inappropriate. *See* note 9, *infra.*

Following the filing of briefs, oral argument was held before the District Court on the motion for summary judgment. By stipulation, Respondent Double JA was permitted to intervene on December 3, 1996. At the oral argument on December 9, 1996, the Court entered a statement on the record that it wanted to "have the matter concluded" before the end of the year because the Judge was leaving the bench. Clerk's Case Summary. The District Court's Order Granting Motion For Summary Judgment was signed on January 3, 1997 and entered on January 8, 1997.

After setting forth the publication of notice provisions of NRS 533.360, the District Court stated at page 5 of the Order Granting Motion For Summary Judgment (App. at 11a) that:

> Notice of change of Applications 55840 and 55481 published in the Mason Valley News conclusively reflects the State Engineer's compliance with the statutory criteria.

At page 8 (App. at 13a) the District Court stated:

> The Court finds the publication criteria contained in NRS § 533.360 was sufficient to apprise Appellants of the pending application. The State Engineer's uncontroverted strict compliance with the publication procedure in NRS § 533.360 is appropriate grounds for summary judgment.

At page 9 (App. at 14a), the District Court stated:

> The Court holds that NRS § 533.360 notice provisions clearly apprised Appellants of the pending application. Due to the Court's previous analysis, the Court finds Appellants' Notice of Appeal is untimely and Appellee is entitled to summary judgment as a matter of law. Furthermore the Court lacks subject matter jurisdiction and the appeal should be summarily dismissed.

In its Order Granting Motion For Summary Judgment, the District Court appears to have equated actual notice with published notice as no fact in the record supported actual notice of the pending applications.[6]

2. Nevada Supreme Court Decision

On appeal, the Nevada Supreme Court reviewed *de novo* the District's Order Granting Motion For Summary Judgment.

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[6] The District Court's suggestion that the Petitioners were "apprised of the proposed transfer" based upon Petitioners' attorneys research of the State Engineer's records and incorporation of an analysis of Josephine Casebolt's historical transfers of her water rights in Petitioners' brief on the merits, which research was conducted several years after the ruling, was so clearly erroneous that the Nevada Supreme Court gave it no credence. Order Granting Motion for Summary Judgment at page 7, App. at 12a.

See e.g., Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989). The Petitioners reiterated in Appellants' Opening Brief the arguments relative to notice they had presented to the District Court. Additionally, they argued in the Appellants' Reply Brief:

> The State Engineer clearly had a duty to give actual notice because the identity of the Swainstons and Wrights was easily ascertainable and he was obligated in the course of processing the Casebolt Applications to make a reasonable effort to identify them and to provide actual notice of the pendency of the applications in his office. The due process clauses of the Nevada and United States Constitutions required him to do so. *See Schroeder v. City of New York,* 371 U.S. 208, 212-13 (1962). This Court has accepted the modern view of notice by publication as announced in such cases as *Schroeder; Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306 (1950); *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983); and *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478 (1988). *See Continental Ins. Co. v. Sister Moseley,* 100 Nev. 337, 338 (1984)(where facts and United State Supreme Court cases required "more than service by publication"). This Court's break with discredited notions of notice by publication was endorsed by the United States Supreme Court in *Pope, supra,* at 484. The State Engineer and Double JA erroneously rely upon constructive notice by publication cases which predate *Sister Moseley* and relevant United States Supreme Court cases.

In its Order Dismissing Appeal entered on March 25, 1999, the Nevada Supreme Court stated at page 3 (App. at 3a):

> The district court found no genuine issue of material fact as to the State Engineer's compliance with the

> statutory notice requirements and further concluded the failure to file a timely appeal deprived the district court of subject matter jurisdiction.

Although the Nevada Supreme Court did not equate actual notice with published notice, it stated what it considered the controlling principle at pages 3-4 of the Order Dismissing Appeal (App. at 4a):

> We have previously ruled that notice beyond that required by Nevada water law is not necessary, stating "[s]uch means of notice is reasonably calculated, under the circumstances to reach the permittee. That it failed to do so in the case at hand cannot be attributed to any neglect of duty on the part of the State Engineer." *Bailey v. State of Nevada*, 95 Nev. 378, 381, 594 P.2d 734, 736 (1979).

The notice referred to out of context was a statutory notice by certified mail to inform a permittee that her permit was being held for cancellation unless proof of beneficial use was received by the State Engineer within 30 days.[7] *Bailey v. State of Nevada,* 95 Nev. 378, 380, 594 P.2d 734, 735-736 (1979). The Court disregarded the fact that in *Bailey,* an appeal was filed pursuant to NRS 533.450 after the expiration of the 30-day limitation period. The *Bailey* Court held that:

> We do not believe that it was the intent of the Legislature to preclude judicial review of an order or decision of which the aggrieved party had no actual knowledge until after expiration of the 30 day period, such as in the instant case.

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[7] The Petitioners were not permittees nor were their water rights a product of any State administrative action.

Id. at 382; *see also, Englemann v. Westergard,* 98 Nev. 348, 352, 647 P.2d 385, 388 (1982)(notice of appeal filed two years late). The Nevada Supreme Court disavowed its own statutory construction of the 30-day limitation period in NRS 533.450 in order to support it's decision.

The Order Dismissing Appeal was based solely upon the Nevada Supreme Court's opinion that the statutory compliance with the notice provisions of NRS 533.360, as a matter of law, provided adequate notice under Nevada water law. The decision was reached without reference to the precedents of this Court dealing with the adequacy of published notice which the Petitioners had presented, particularly the *Mullane* and *Schroeder* line of cases.

REASONS FOR GRANTING THE WRIT

1. The Nevada Supreme Court's Order Dismissing Appeal Disregarded This Court's Precedents And The Order Conflicts With Relevant Decisions Of This Court.

The decision below in this case implicates the core functions of this Court. It challenges this Court's fundamental duty to say what the law requires with regard to important federal constitutional issues and this Court's interest in having its statements of the law respected when issues, once ruled upon, again arise in similar contexts in cases and controversies in state courts.

The decision below has decided an important federal question in a way that conflicts with relevant decisions of this Court. Even assuming that all of the facts were as the Nevada Supreme Court described them, the Court's Order Dismissing Appeal is a serious departure from this Court's precedents having to with the adequacy of published notice. The Nevada Supreme Court stated at page 3 of the Order Dismissing Appeal (App. at 3a):

> It is "also settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." Application of Filippini, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949).

Other than its citation to *Filippini*[8], the Court provided no basis for treating state administrative permits for the appropriation of water any differently than any other permits that state and local governments routinely process. The Court interpreted its characterization of Nevada water law as "special in character" to mean the State's interest in the provisions and procedures of such law permit the Nevada courts to disregard important and controlling United States Supreme Court precedents concerning notice by publication. The Nevada Supreme Court so held when it stated that "notice beyond that required by Nevada water law is not necessary...." *Id.* The Nevada Supreme Court did, in fact, disregard the leading cases of *Schroeder v. City of New York,*

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[8] The citation by the Nevada Supreme Court of *Filippini,* 66 Nev. 17, 27, 202 P.2d 535, 540 (1949) for the "special in character" language is inapposite to the facts of this case. The *Filippini* Court's language was limited to the "method of appropriating the unappropriated water belonging to the state" and the "means for determining the relative rights of users of waters of this state." *Id.* at 30. This case has nothing to do with either the method or means described in *Filippini*. It has to do with the due process protection of vested property rights which Petitioners had secured by a Federal court decree and the common law doctrine of prior appropriation well before the provisions referred to by the Court were enacted. The State of Nevada's interest in its water is not as extensive as the Nevada Supreme Court assumed. The *Filippini* case assumed that the State owned the water within its borders, a proposition which has been substantially weakened by precedents of this Court. *See e.g., Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 (1982) (legal fiction of state ownership did not prevent ground water from being an article of commerce).

supra; Mullane v. Central Hanover Tr. Co., supra, and their progeny, even though the facts of *Schroeder* are indistinguishable in material respects from this case. Disregarding a self imposed obligation to conduct a *de novo* review with regard to the granting of summary judgment, the Nevada Supreme Court observed that "The district Court found no genuine issue of material fact as to the State Engineer's compliance with the statutory notice requirements..." App. at 3a. Further disregarding the Petitioners' claims that the notices were defective in that no place of use was described, the Court held that the Respondent State Engineer " . . . . properly published a notice of an application for permission to change the point of diversion and place of use of the public waters of the state of Nevada in the Mason Valley News, a newspaper of general circulation as required by NRS 533.360 (1)." App. at 2a.

In *Schroeder, supra,* at 210, 211, this Court recognized that compliance with a publication statute did not measure up to the quality of notice required by the Due Process Clause of the Fourteenth Amendment:

> Proceeding in accordance with the statute, the city caused notice of its acquisition of the right to divert the Neversink to be published the requisite number of times in the City Record of the City of New York, in two New York Newspapers, and in two newspapers published in Orange County, and in addition posted 22 notices on trees and poles along a seven- or eight-mile stretch of the river in the general vicinity of the appellant's premises. . . .
>
> The trial court granted the city's motion for judgment on the pleadings in an unreported opinion holding that "the notice provisions of Section K 41-8.0 of the Water Supply Act-admittedly fully complied with by the defendant" — were not "violative of the due process

> provisions of the Federal and State Constitutions.. . ." This judgment was affirmed by the Appellate Division, and the New York Court of Appeals, two judges dissenting. This case is properly here on appeal under 28 U.S.C. §1257(2).
>
> We hold that the newspaper publications and posted notices in the circumstances of this case did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment requires.

Notwithstanding the City of New York's compliance with the notice statute, this Court held on appeal that the published notice and posted notices were constitutionally inadequate. The Nevada Supreme Court held in this case, however, that similar published notices provided for by Nevada water law were adequate as a matter of law. *Mullane* and *Schroeder* have for decades set the standard for decisions of State and lower Federal courts that notice by publication is inadequate where the facts and circumstances require personal and individualized notice which mere publication, however statutorily correct, cannot provide. The Nevada Supreme Court's identification of Nevada's water law as "special in character" as justification for its refusal to take notice of this Court's precedents is an affront to this Court's function to provide standards and uniform rules of decision on important federal constitutional questions having to do with the adequacy of notice for due process purposes.

The Nevada Supreme Court has previously addressed the notice by publication issue in connection with another body of State law which the State has an interest. It considered the adequacy of a published notice in connection with Nevada's "nonclaim statutes" in probate proceedings, in *Continental Ins. Co. v. Sister Moseley,* 98 Nev. 476, 478, 653 P.2d 158, 160 (1982), 463 U.S. 1202, (1983)(*cert. granted, vacated and*

remanded) wherein it held erroneously that published notice was reasonably and sufficiently calculated to provide actual notice to appellant in the circumstances of the case. This Court granted a petition for a writ of certioarari, vacated the Nevada Supreme Court's opinion and remanded for further consideration in light of *Mennonite Bd. Of Missions v. Adams,* 462 U.S. 791 (1983). On remand, the Nevada Supreme Court, citing *Mennonite and Mullane,* correctly concluded that "more than service by publicaton was required in order to afford due process to appellant." *Continental Ins. Co. v. Sister Moseley,* 100 Nev. 337, 338, 683 P.2d 20, 21 (1984). This Court endorsed the Nevada Supreme Court's decision in *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988). Having had the benefit of this Court's remand in a similar case and this Court's subsequent approbation for its corrective action, the Nevada Supreme Court's disregard of this Court's precedents is inexcusable particularly where it's prior experience was brought to the direct attention of the Court in Appellants'[Petitioners'] Reply Brief, pp. 4-5.

In the process of reaching a strict and mandatory construction of the 30-day limitation period in NRS 533.450, which limits the subject matter jurisdiction of the Nevada district courts as if the statute were a statute of repose, the Nevada Supreme Court *sub silentio* overruled several of its own water cases which had held that the 30-day period was a nonjurisdictional statute of limitation. In *Engelmann v. Westergard, supra,* 98 Nev. 348, 351, 647 P.2d 385, 387 (1982) the Nevada Supreme Court ruled that it was reversible error for the district court not to exercise its subject matter jurisdiction even if the 30-day limitations period had elapsed. Cases such as *State Engineer v. American Nat'l. Ins. Co.*, 88 Nev. 424, 498 P.2d 1329 (1972), *Bailey v. State, supra,* 95 Nev. 378, 594 P.2d 734 (1979), as well as *Engelmann,*

provide ample support that the 30-day period has historically been considered a statute of limitation, subject to equitable defenses such as tolling, waiver, fraud, estoppel, etc. The Nevada Supreme Court inappropriately extended the binding effect of *actual* notice arising in a court adjudication proceeding, *G&M Properties v. District Court,* 95 Nev. 301, 303, 594 P.2d 714, 715 (1979)("...the state engineer...twice in writing notified all interested parties,. . ."), to the *published* notice arising in this case. Curiously, the Nevada Supreme Court regards statutes of limitations in the criminal context, and presumably in all other civil contexts, as do the majority of jurisdictions as non-jurisdictional affirmative defenses subject to waiver and other equitable considerations. *See e.g., Hubbard v. State,* 110 Nev. 671, 677, 877 P.2d 519, 522 (1994).

While the Nevada Supreme Court is competent to characterize Nevada law, when that characterization violates the Fourteenth Amendment's due process clause it must be reversed. Reversal is particularly necessary where the Nevada Supreme Court's decision creates a rule of law which will have general applicability for innumerable future cases.

This case is not an aberration or an isolated decision of little general interest. The Nevada Supreme Court has limited the subject matter jurisdiction of the State's district courts and thereby eliminated a due process remedy for a substantial class of persons who, without adequate notice of an administrative order or decision of the Nevada State Engineer and as the result of the lack of such notice, do not file a notice of appeal within 30-days of the rendition of the order or decision. *See* NRS 533.450(3). The course chartered by the Nevada Supreme Court will inevitably affect the due process rights of innumerable aggrieved persons (including the United States and Federal agencies which are persons under Nevada water law) without notice of the administrative decisions of

the Nevada State Engineer. It will jeopardize the property interests of members of the general public who may be injured by the State Engineer's water decisions, whether or not they have water rights. It will force vested water rights holders to comb the fine print in the legal sections of local newspapers daily to ascertain if any of the hundreds of water decisions made by the State Engineer on a monthly basis will affect their interests.

The extent to which the Nevada decision may affect decisions in other states that share Nevada's scheme of water resource administration is difficult to evaluate. That there may be a significant effect may be anticipated as the Western States have a well developed network of information sharing through the Western States Water Council, regional meetings and conferences and even legal education seminars. The other western states have similar notice by publication provisions in their statutes. As the scarce surface water resources become fully appropriated, pressure will necessarily increase on the underground resources, and state administrative permits to tap underground water may become an instrument of oppression without safeguards for adequate notice and an opportunity to be heard. Because of the expense and difficulty of proving injury, remediation may be difficult. Only the exceptional case will be brought to the attention of the courts. This is an exceptional case. Injury has been shown and the Petitioners are before the Court.

In summary, the arbitrary elevation of Nevada water law over constitutional requirements should not be tolerated. The decision of the Nevada Supreme Court is not only wrong, unless checked, it will send a message that it is acceptable for state courts to disregard this Court's decisions and decide important federal constitutional issues in ways that conflict with relevant decisions of this Court to the injury of vested property interests.

2. The Absence Of A Factual Record Underscores the Inadequacy of the Published Notice And Emphasizes The Conflict With the Teachings of this Court's Cases.

This Court in *Mullane, supra,* at 320, stated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." The Nevada Supreme Court ignored this Court's admonition that the analysis of the adequacy of notice is necessarily fact dependent. The failure by the Nevada Supreme Court to insist that a factually complete record was developed by the District Court and was made available for it to determine the adequacy of notice was a serious departure from the decisions of this Court.

The only facts considered in the courts below to counter Petitioners' allegations in their pleading that they had no actual or constructive notice before the well rig appeared and their identification of a continuing controversy over similar underground diversions in their neighborhood (*supra*. at pp. 6-7) were the factual contents of the notices and the fact of their publication contained in the State Engineer's administrative Record on Review. Summary judgment was based on these facts alone. The decisions in the courts below disregarded the factual inquiry required by the "general rule that . . . . notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder, supra*, at 212-213.

Implicit in summary judgment by the courts below is the implication that there were no material issues of fact in dispute. Material issues of fact relative to the adequacy of notice *were* in dispute, however. A listing of material facts in dispute which Petitioners had identified for the hearing on the

merits were provided to both of the courts below.[9] The courts

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[9] The Petitioners presented a listing of material facts in dispute to both the District Court and the Nevada Supreme Court in their briefs(District Court: Appellants' Memorandum of Points and Authorities In Opposition To The State Engineer's Motion For Summary Judgment at pages 5-7 and the Nevada Supreme Court: Appellant's Opening Brief at note 11, page 13) which they argued made summary judgment inappropriate:

A. Facts which establish the Petitioners' claim to vested property rights to their underground water resources.

B. Facts which bear upon the State Engineer's knowledge that there was a continuing controversy concerning the effect of the unregulated pumpage of the Fulstone well which required actual notification before another well was located within one-third of a mile from Petitioners' domestic wells. A discussion relative to a 1988 Field Investigation by the State Engineer's staff of the Fulstone well was presented.

C. Facts which demonstrate that the Petitioners had suffered an unreasonable lowering of the water table even before the Casebolt applications were approved.

D. Facts which demonstrate that the Petitioners, because of their ages and other infirmities were not likely to receive adequate notice by publication in the Mason Valley Times.

E. Facts which demonstrate that the manner and content of the published notice was not reasonably calculated to provide adequate notice to the Petitioners.

F. Facts which demonstrate the minor burden to the State Engineer to notify the Petitioners of the filing and pendency of the Casebolt applications.

G. Facts which are related to the issue of whether the State Engineer complied with the notice provisions contained in NRS 533.360(1). The Petitioners presented a discussion of the defects.

H. Other facts which bear upon the adequacy of published notice in the circumstances of this case.

I. Facts relating to fairness and equity considerations which bear upon the Court's consideration to impose equitable tolling of the 30-day limitation period in NRS 533.450.

J. Facts in possession of the State Engineer which would be predictive of the extent of development of a cone of depression resulting from the Ascuaga well.

below chose to ignore them.

Certain facts cannot be ignored. The fact that the Petitioners' first notice of the filing of the applications and the resulting ruling was the inquiry notice provided by the appearance of a well rig at the end of March 1992 is uncontested. The fact that the Petitioners filed a notice of appeal pursuant to NRS 533.450 within 30-days of their discovery of the State Engineer's Ruling appears in the record. The fact that the Petitioners had certified water rights which would be adversely affected were of record in a computerized printout of water rights in the area of the proposed well site which was provided by the State Engineer as part of the administrative record before the courts below. The fact that the State Engineer was obligated to do a field investigation to ascertain the existence of conflicts with existing rights may be inferred from his duty under NRS 533.370(3) to deny an application where "its proposed use or change conflicts with existing rights." The Nevada Supreme Court did not acknowledge these facts, rather it confined its review to the State Engineer's compliance with the publication of notice statute, NRS 533.360. The Court did not consider whether the Petitioners' identity was easily ascertainable within the meaning of *Schroeder, supra.* The Nevada Supreme Court dismissed any factual inquiry by stating that: "The district court found no genuine issue of material fact as to the State Engineer's compliance with the statutory notice requirements...." Order Dismissing Appeal at page 3, App. at 3a. The Court foreclosed any further inquiry by holding that "notice beyond that required by Nevada water law is not necessary, ..." *Id.* at 4a.

The Order Dismissing Appeal is internally inconsistent in a material way. Through inadvertance or neglect by the drafter of the Order Dismissing Appeal the wrong publication

of notice statute, NRS 533.360(1), was set forth in footnote 1 of the Order Dismissing Appeal (App. at 2a). The portion of the statute set forth was enacted in 1993, two years after the notices were published by the State Engineer in the Mason Valley News. It contained a requirement that in addition to a description by legal subdivision or metes and bounds, "a physical description of that place of diversion," be included. A physical description would have necesarily identified land owned by Respondent Double JA. The State Engineer's notices[10], on their face, did not identify Double JA land and, consequently, did not comply with the statute set forth by the Court. Had the statute set forth in the Order Dismissing Appeal been compared with the wording of the notices the defect in the notices would have been obvious. Thus, it is impossible to draw the conclusion that the Court had independently arrived at its own finding of fact that the State Engineer had complied with the statutory notice as part of its *de novo* review or, indeed, that there was any "adhesion to fact" at all.

A more fundamental problem exists with respect to the notices required by the version of NRS 533.360(1) which was actually in effect in 1991. The language of the statute is inherently self limiting to applications for new appropriations, not applications to change the point of diversion or place of use of existing permits. The State Engineer has recognized this deficiency by *sui sponte* enlarging the content of the notices for applications to change the point of diversion to include both the existing point of diversion and the proposed point of diversion. Adequate notice of the change in place of use, in similar fashion, required that both the existing place of use and the proposed place of use be included. The State Engineer failed to include any description of the existing place

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[10] *See* note 4, *supra*.

of use or the proposed place of use in his notices. Failure to do so provided no information in the notices as to the new place of use where the water would be applied to beneficial use. This was a significant defect in the notices. In *Desert Irrigation, Ltd. v. State of Nevada,* 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997), the Nevada Supreme Court stated:

> The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states. In fact, the principle of beneficial use is so well entrenched in our legal lexicon that the Nevada Legislature declared almost a century ago that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water."

The Nevada Supreme Court ignored the factual necessity for the notices to contain a description of the *proposed* place of use where the applicant for a change in the place of use would apply the water to beneficial use.

The Petitioners alleged in their Notice of Appeal that the notices were defective ". . . . in providing Appellants of actual or constructive notice of a transfer of the beneficial use of water rights. . . ." *See*, *supra* at page 7.

The Court also ignored the factual necessity for the *existing* place of use to be identified in the notices. NRS 533.040 requires that water used for beneficial purposes in Nevada shall remain appurtenant to the existing place of use unless it becomes impractical to use water beneficially or economically at the place to which it is appurtenant. A potential protestant would be unable to consider a protest on the basis set forth in NRS 533.040(1) if an identification of

the existing place of use was not included in the notice.[11] The Nevada Supreme Court's failure to consider the constitutional implications of such factually deficient notices cannot be characterized as a "pretty close adhesion to fact" required by *Mullane, supra,* at 320.

The Nevada Supreme Court made inferences from facts which are not in the record in an attempt to bolster its decision. The Nevada Supreme Court's Order Dismissing Appeal contains the statement that "Three parties filed timely protests with the State Engineer." Order at p.2, App. at 2a. This fact is true; however, the inference that the three protestants received notice from the newspaper and timely filed protests based upon such notice is not supported by any fact in the record below. Such an inference is more likely false than true. The record reflects the fact that one of the protestors, Vernon F. Bryan, Inc., was the owner of the land where the Bryan corporation had exercised the water right in Casebolt's stead before its transfer. It is more probable than not that the owners of Vernon F. Bryan, Inc., received notice directly from Josephine Casebolt. It is equally likely that they, in turn, notified their neighbors, the Annett family and Milton E. Bacon to support Vernon F. Bryan, Inc. in its

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[11] No factual inquiry was made as to whether it was impractical for Josephine Casebolt to make beneficial or economical use of her water rights at the place of use to which they had become appurtenant. This was a precondition to the processing of her applications and for the publishing of notices of the same. *See* NRS 533.360(1) (. . .when an application is filed in compliance with this chapter the state engineer shall, within 30 days, publish. . .). The record reflects that water continues to be beneficially used at the well from which Casebolt's water rights were transferred to this day.

protest.[12] The protests of each of the protestants reveal that each of them were concerned that the water would be transferred to "new ground" in their general neighborhood which prompted the State Engineer to disabuse them of their misinformation as to the new place of use. *See* State Engineer's Ruling No. 3854 at pages 2-3 (App. at 19a)("...protestants do not have water rights near the *proposed* point of diversion....") It is apparent that the protestants did not receive the information upon which they based their protests from the published notices.

The Order Dismissing Appeal stated that "Appellants failed to file a protest." Black's Law Dictionary says the word fail connotes "fault, negligence, or refusal." Black's Law Dictionary, 6th Ed. at 594. The record below is clear that the first notice the Petitioners had that something was wrong was the appearance of the well rig at the other side of their fence line at the end of March 1992. The suggestion that the Petitioners "failed" to file a protest is patently false in view of the uncontested fact that they had no actual notice of the applications until nearly a year after the notices were published and almost ten months after the period for filing protests had been closed. *See* NRS 533.365.

This is not a case in which the court below reached its result through erroneous factual findings. The errors of fact and improper inferences were simply incidental to the court's failure to apply a properly stated rule of law. They do, however, indicate a disregard of the necessity to address facts which were pertinent to the question of whether the published

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[12] The similarity in the language of the protests suggest that they were coordinated. The Vernon F. Bryan Inc. protest, being the first one; it is likely that the others were patterned after it based on discussions with the first protestant. Ruling at page 2; App. at 17a-18a.

notices were adequate in the circumstances of this case as required by this Court's precedents.

In the past this Court has been vigilant to address and correct small but important nuances with respect to factual distinctions in issues having to do with adequate notice, most recently in *City of West Covena v. Perkins*, __U.S.__, (Case No. 97-1230 decided January 13, 1999)(notice of public procedures for protecting property interests compared to procedures not accessible to the public). In this case, the Court's carefully crafted and well developed instructions with regard to the necessary factual inquiries have been summarily ignored. This Court should not hesitate to apply appropriate remedial measures once again in this case to redirect the Nevada Supreme Court's treatment of this important federal constitutional issue.

CONCLUSION

For the reasons contained herein, the Petitioners respectfully pray that a writ of certiorari issue. Indeed, the error of the decision below, particularly with respect to the Nevada Supreme Court's disregard of this Court's precedents and its failure to decide the case on an adequate factual record having to do with the adequacy of notice for due process purposes is so clear, that summary reversal on the authority of *Schroeder v. City of New York, supra,* is appropriate.

Dated this 11th day of June, 1999.

Respectfully submitted,
GEORGE W. SWAINSTON
HARRY W. SWAINSTON

Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEVADA

No. 30020

DOROTHY E. SWAINSTON,
BY AND FOR HERSELF AND AS EXECUTRIX
OF THE GEORGE E. SWAINSTON ESTATE
AND TRUSTEE OF THE GEORGE D. SWAINSTON
FAMILY TRUST, WAYNE C. WRIGHT
AND NADIA WRIGHT,

Appellants,

vs.

R. MICHAEL TURNIPSEED,
NEVADA STATE ENGINEER, AND
DOUBLE JA LAND & LIVESTOCK COMPANY, INC.,
A NEVADA CORPORATION,

Respondents.

FILED
MAR 2 5 1999
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY s/ J. Richards
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court granting summary judgment on the ground that there was no genuine issue of fact as to the question of proper notice. The district court further ruled that appellant's appeal was time

barred because it was filed more than thirty days after the limitation set forth in NRS 533.450 and the failure to file the appeal timely deprived the district court of subject matter jurisdiction.

Respondent R. Michael Turnipseed, Nevada State Engineer ("State Engineer"), properly published a notice of an application for permission to change the point of diversion and place of use of the public waters of the state of Nevada in the Mason Valley News, a newspaper of general circulation as required by NRS 533.360(l).[1]

Three parties filed timely protests with the State Engineer. Appellants failed to file a protest. The State Engineer granted the application determining it "would not interfere with existing water rights nor threaten to be detrimental to the public interest."

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[1] NRS 533.360(l) provides in part:

> [W]hen an application is filed in compliance with this chapter the state engineer shall, within 30 days, publish or cause to be published once a week for 4 consecutive weeks in a newspaper of general circulation and printed and published in the county where the water is sought to be appropriated, a notice of the application, which sets forth:
>
> (a) That the application has been filed.
> (b) The date of the filing.
> (c) The name and address of the applicant.
> (d) The name of the source from which the appropriation is to be made
> (e) The location of the place of diversion, described by legal subdivision or metes and bounds and by a physical description of that place of diversion.
> (f) The purpose for which the water is to be appropriated.
>
> The publisher shall add thereto the date of the first publication and the date of the last publication.

Appellants filed an appeal in the district court one hundred and twenty days after the State Engineer's ruling and more than ninety days after the appeal period provided in NRS 533.450[2] had lapsed. The State Engineer moved the court to dismiss the appeal as being untimely.

The district court found no genuine issue of material fact as to the State Engineer's compliance with the statutory notice requirements and further concluded the failure to file a timely appeal deprived the district court of subject matter jurisdiction.

Summary judgment should be granted when no genuine material fact exists for trial. NRCP 56(c).

It is "also settled in this state that the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." Application of Filippini, 66 Nev. 17, 27, 202 P.2d 535, 540 (1949).

In *G & M Properties v. District Court*, 95 Nev. 301, 305, 594 P.2d 714, 716 (1979), this court held that a district court

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[2] NRS 533.450(l) states in part:

> 1. Any person feeling himself aggrieved by any order or decision of the state engineer, . . .affecting his interests, when such order or decision relates to the administration of determined rights . . . may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated. . . . Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

was without jurisdiction to consider two late-filed water rights exceptions: "the statutory notice requirements [are] mandatory, requiring strict compliance." Appellants failed to appeal timely the State Engineer's decision.

Appellants claim the State Engineer violated their due process rights by failing to send actual notice of the application. We have previously ruled that notice beyond that required by Nevada water law is not necessary, stating "[s]uch means of notice is reasonably calculated, under the circumstances, to reach the permittee. That it failed to do so in the case at hand cannot be attributed to any neglect of duty on the part of the State Engineer." *Bailey v. State of Nevada*, 95 Nev. 378, 381, 594 P.2d 734, 736 (1979).

We conclude the failure to file a timely appeal pursuant to NRS 533.450(l) deprived the district court of subject matter jurisdiction. Therefore, the district court did not err in granting summary judgment in favor of respondents. Accordingly, we

ORDER this appeal dismissed.

s/ Rose ,C.J.

s/ Young ,C.J.

s/ Maupin ,C.J.

s/ Shering ,C.J.

s/ Agosti ,C.J.

s/ Leavitt ,C.J.

s/ Becker ,C.J.

CC: Hon. Mario G. Recanzone, Senior Judge
Attorney General
Erickson, Thorpe & Swainston, Ltd.
Marshall, Hill, Cassas & de Lipkau
Lyon County Clerk

APPENDIX B

IN THE THIRD JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

GEORGE D. SWAINSTON, DOROTHY E. SWAINSTON, WAYNE D. WRIGHT, and NADIA WRIGHT,
Appellants,

vs.

R. MICHAEL TURNIPSEED, Nevada State Engineer,
Appellee;

DOUBLE JA LAND & LIVESTOCK COMPANY, INC., a Nevada Corporation,
Intervenor/Appellee and
Real Party in Interest.

Case No. CI 10615
Dept. No. I

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LYON COUNTY CLERK
TANYA SCEIRINE
DEPUTY

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On December 9, 1996, this matter came before the Court on Appellee's Motion for Summary Judgment filed October

3, 1996. Appellee, R. Michael Turnipseed, Nevada State Engineer, (hereinafter, State Engineer) was represented by Marta Adams of the Attorney General's Office. Appellants filed an opposition on October 25, 1996 to which Appellee filed a Reply on November 4, 1994. Appellants George D. Swainston, Dorothy E. Swainston, Wayne D. Wright and Nadia Wright, (hereinafter Swainston), were represented by George W. Swainston, Esq.

On November 26, 1996, the parties stipulated to the intervention of Double JA Land & Livestock Company, Inc., (hereinafter, Double JA). On December 3, 1996, the Court granted intervention.

On December 3, 1996, Double JA filed a Motion to Dismiss. Swainston opposed the Motion to Dismiss on December 9, 1996. On December 16, 1996, Double JA replied. Oral argument was heard by the Court on December 19, 1996. Double JA was represented by Ross E. de Lipkau, Esq.

Statement of the Case

On February 14, 1991, Josephine Casebolt applied for authorization to change the point of diversion and place of use of Permit 49446, Certificate 12095 and Permit 49447, Certificate 12096. I ROR 2; I ROR 3. Casebolt requested transfer of her water rights onto the property of John Ascuaga. Ascuaga paid the filing fee.

Pursuant to NRS 533.360(l), the State Engineer published the proposed transfer in the *Mason' Valley News,* a weekly newspaper of general circulation. I ROR 4. The publication ran five 5) consecutive weeks; the first publication on April 12, 1991, and the last on May 10, 1991. *Id.* Pursuant to NRS § 533.365, three verified protests were filed. I ROR 7-11. Swainston declined formal protest. On December 10, 1991,

the State Engineer overruled the protests and approved the application issuing Ruling No. 3854. I ROR 1.

On April 15, 1992, Swainston filed a Notice of Appeal requesting Ruling No. 3854 be set aside and nullified. NRS § 533.450 provides that a person feeling aggrieved by a decision of the State Engineer may commence a proceeding within thirty (30) days of issuance in district court. Swainston's Notice of Appeal was filed in excess of ninety (90) days after Ruling No. 3854, more than sixty (60) days after the NRS § 533.450 appeal period. As grounds for the appeal, Appellants argue the published notice of the proposed transfer was defective, the ruling was detrimental to the public interest, and the ruling was not supported by the evidence. Appellants also contend the time limit in which appeal began was the date of actual notice.

On May 15, 1992, the State Engineer filed a Motion to Dismiss for lack of subject matter jurisdiction because the appeal was untimely. Swainston opposed the Motion on May 29, 1992. On October 27, 1992, the Court denied the Motion to Dismiss. The Court reasoned the issue of subject matter jurisdiction was intertwined with the facts and the action would not be dismissed barring further review. *Order Denying Motion to Dismiss.* On December 8, 1992, Appellee Answered.

On January 19, 1993, Appellants filed a Case Conference Production Demand (NRCP 16.1(b)). Appellee subsequently received a Notice of Early Case Conference on March 4, 1993. The State Engineer opposed the pretrial discovery request and sought a protective order precluding the pretrial discovery requirements of Rule 16.1. On May 3, 1993, the Court issued a protective order.

On January 17, 1996, the parties stipulated to the record on review. On February 16, 1996, Appellants filed their Opening Brief with attached supplemental evidence. On April 19, 1996, the State Engineer filed an Answering Brief and Motion to Strike Appellants' Supplements to the Record on Review. On May 22, 1996, Swainston filed a Reply Brief.

On October 3, 1996, the State Engineer filed a Motion for Summary Judgment. Appellants Opposition was filed on October 25, 1996. Thereafter, on November 4, 1996, Appellee filed a Reply Memorandum. The Motion for Summary Judgment came before the Court for oral argument on December 9, 1996.

In November the parties filed a Stipulation Allowing Intervention of Double JA Land & Livestock Company, Inc. to intervene as an appellee. On December 3, 1996 the Court granted the Motion for Intervention. On December 3, 1996, Double JA filed a Motion to Dismiss. Appellants filed an Opposition to the Motion on December 9, 1996. Double JA replied to Swainston's Opposition on December 16, 1996. The Court carefully reviewed the relevant evidence presented and issues the following decision.

Motion for Summary Judgment
Standard of Review

Under Nevada Rules of Civil Procedure, Rule 56, a trial court may grant summary judgment if there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law *Boland v. Nevada Rock and Sand* Co., 111 Adv. Op. 60, p. 2 (1995) (citations omitted). "To prevail, the nonmoving party must show specific facts demonstrating the existence of a genuine issue for trial." *Id.* Depositions, answers to interrogatories, admissions, and affidavits may be used to pierce allegations in determining

whether material facts are in dispute. Additionally, the evidence must be viewed in a light most favor able to the party opposing the motion. Where there is not the "slightest doubt" to any material issues, summary judgment is appropriate. *See*, *Roy v. Lancaster,* 107 Nev. 460, 462, 814 P.2d 75, 76 (1991).

I.

Although various issues have been mentioned, the motion at bar centers on notice.

The State Engineer contends he complied with the statutory requirements of NRS § 533.360. NRS § 533.360 provides, in pertinent part:

> [W]hen an application is filed in compliance with this chapter the state engineer shall within 30 days, publish or cause to be published once a week for 4 consecutive weeks in a newspaper of general circulation and printed and published in the county where the water is sought to be appropriated, a notice of the application, which sets forth:
>
> (a) That the application has been filed.
>
> (b) The date of the filing.
>
> (c) The name and address of the applicant.
>
> (d) The name of the source from which the appropriation is to be made.
>
> (e) The location of the place of diversion.
>
> (f) The purpose for which the water is to be appropriated. The publisher shall add thereto the date of the first

> publication and the date of the last publication.

Notice of change of Applications 55840 and 55841 published in the *Mason Valley News* conclusively reflects the State Engineer's compliance with the statutory criteria. I ROR 4; I ROR 5. All pertinent information required by the statute is incorporated in the publication. Swainston does not challenge the State Engineer compliance. The State Engineer contends there is no dispute over statutory compliance, therefore, he is entitled to summary judgment.

Appellants insist notice by publication was unsatisfactory in providing actual or constructive notice of the proposed transfer. Appellants argue they were entitled to personal notice of the application because the notice afforded in NRS § 533.360(l) was inadequate to apprise them of the pendency of a decision relative to the application. Due to the insufficiency of notice, Appellants assert the thirty (30) day appeal period did not commence until they were informed of Ruling 3854.

A fundamental tenant of due process in any proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 314, 94 L.Ed 865, 70 S.Ct. 652 (1950). Swainston argues they have been denied due process rights guaranteed by the Constitution. Accordingly, Swainston is entitled to a meaningful opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 244, 90 S.Ct. 1011, 25 L.Ed.2d. 287 (1970). When an individual is deprived of a due process right, governmental agencies must afford an opportunity for the individual to be heard. *Logan v. Zimmerman Brush, Co.*, 455 U.S 422, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265 (1982).

Additionally, Swainston cites *Bing Construction v. Douglas County,* 107 Nev. 262, 810 P.2d 768 (1991), in support of their position. The *Bing Construction* Court held that counties could not alter zoning in derogation of a special use permit "without personally notifying the citizens who will be directly affected." *Id.*, at 265. The case at bar can be distinguished from *Bing Construction* inasmuch as there has been no definitive showing that the transfer would cause a derogation of Appellants' vested water rights.

In their brief, Appellants explained that Casebolt's "efforts to move water from one place to another . . . by 1991 had become so commonplace that they lost significance as events of importance. . . . *Appellants' Opening Brief, p.18.* This statement admits the Appellants were apprised of the proposed transfer. Due to the previous affirmation, it is reasonable to conclude the Appellants would not have acted differently if notice of the application were personally served. *See, Schroeder v. New* York, 371 U.S. 208, 9 L.Ed.2d 255 (1962).

"Notice should [ ] be served, at a minimum, upon those parties who have participated in the proceedings." *Desert Valley Water Co. v. State Engineer,* 104 Nev. 718, 720, 766 P.2d 886 (1988). The filings clearly indicate that after notice of the application, Appellants failed to participate in the administrative process. As a result of their failure to file a verified protest, Appellants were not personally notified of the final ruling.

Although there is no Nevada holding directly on point, the Court finds G *& M Properties v. District Court,* 95 Nev. 301, 246 P.2d. 714 (1979), persuasive. In G & M *Properties,* the court found the language of NRS 533.170 to be plain and unambiguous and interpreted "the statutory notice requirement as mandatory, requiring strict compliance." *Id.*, 95 Nev., at

305. The Court holds NRS § 533.360 is plain and unambiguous. Therefore, the requirements annunciated therein are mandatory and require strict compliance. *Application of Filippini*, 66 Nev. 17, 202 P.2d 535 (1949). The Court finds the publication criteria contained in NRS § 533.360 was sufficient to apprise Appellants of the pending application. The State Engineer's uncontroverted strict compliance with the publication procedure in NRS § 533.360 is appropriate grounds for summary judgment.

The Court is aware this ruling is inconsistent with the Order Denying Motion to Dismiss, dated October 27, 1992. However, at the time of the Motion to Dismiss, the Court was not aware of all of the evidence contained in the Record on Review. In rendering its decision, the Court relied upon all evidence presented and the Appellants' pleadings.

II.

Additionally, Appellants contend that Ascuaga's name should have been included in the newspaper publication. *Appellants' Opening Brief*, p. 73. Swainston asserts the published notice was misleading because the transfer was to the property of another and did not include the name of the real party in interest.

Contrary to Appellants' assertions, the filings indicate that the water rights transferred were owned by Josephine Casebolt at the time of application. There is no law in Nevada that a water permit owner cannot transfer their water right to the land of another. Applying Nevada law to the case at bar, the Court finds that any alleged, adverse impact on Appellants, vested water rights would have ocurred regardless of the names listed on the application. Therefore, the omission of John Ascuaga's name from the publication is irrelevant in providing notice of the proposed transfer.

Motion to Dismiss

Subsequent to the Court's grant of permission for intervenor, Double JA filed a Motion to Dismiss the action. The Motion is based upon notice issues identical to the Summary Judgment. Due to the previous analysis, the Court finds it is unnecessary to address the Motion to Dismiss at this time. Therefore, as a matter of law, the Motion to Dismiss is moot.

Conclusion

Summary Judgment is appropriate where no genuine issue of material fact remains for trial and one party is entitled to judgment as a matter of law. *Burnett v. C.B.A. Security Service,* 107 Nev. 787, 788, 820 P.2d 750, 751 (1991). Thorough analysis of the record reveals no controverted material issue of fact with respect to the issue of notice. The Court finds Appellants had actual notice of the application and were not denied due process or the opportunity to participate. The Court holds that NRS § 533.360 notice provisions clearly apprised Appellants of the pending application. Due to the previous analysis, the Court finds Appellants' Notice of Appeal is untimely and Appellee is entitled to summary judgment as a matter of law. Furthermore, the Court lacks subject matter jurisdiction and the appeal should be summarily dismissed.

Good cause appearing therefore;

IT IS HEREBY ORDERED that Appellee's Motion for Summary Judgment be, and the same is hereby, GRANTED. and the appeal is dismissed.

DATED: This 3rd day of January, 1997.

/s/ Mario G. Recanzone
MARIO G. RECANZONE
DISTRICT JUDGE

APPENDIX C

IN THE OFFICE THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS
55840 AND 55841 FILED TO CHANGE
THE POINT OF DIVERSION AND PLACE OF USE
OF THE WATER OF AN UNDERGROUND SOURCE
IN THE SMITH VALLEY GROUND
WATER BASIN, LYON COUNTY, NEVADA

RULING #3854

GENERAL

I.

Application 55840 was filed February 14, 1991, by Josephine Casebolt to change the point of diversion and place of use of 1.32 cubic feet per second (cfs), 320 acre-feet annually, water heretofore appropriated under Permit 49446, Certificate 12095. The water is to be used for irrigation and domestic purposes on 80 acres of land within the E1/2 SE1/4 Section 24, T.11N. R.23E., M.D.B.&M. The proposed point of diversion is within the SE1/4 SE1/4 Section 24, T.11N., R.23E., M.D.B.&M. The existing point of diversion is within the NW1/4 NE1/4 Section 3,and.the existing place of use is 80 acres within the N1/2 NE1/4 Section 3, T.11N., R.23E., M.D.B.&M.[1]

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[1] Public records of the State Engineer, under Applications 55840 and 55841, Permit 49446, Certificate 12095; Permit 49447, Certificate 12096; Permit 25690, Certificate 9215; and Permit 25543, Certificate 7557.

The date of priority of Application 55840 and Permit 49446, Certificate 12095, is July 2, 1970, the same as that of the filing date of the base right, Permit 25690, Certificate 9215.[1]

Application 55841 was filed February 14, 1991, by Josephine Casebolt to change the point of diversion and place of use of 0.29 cfs, 65.26 acre-feet annually, water heretofore appropriated under Permit 49447, Certificate 12096. The water is to be used for irrigation and domestic purposes on 80 acres of land within the E1/2 SE1/4 Section 24, T.11N. R.23E., M.D.B.&M. The proposed point of diversion is within the SE1/4 SE1/4 Section 24, T.11N. R.23E., M.D.B.&. The existing point of diversion is within the NW1/4 NE1/4 Section 3, and the existing place of use is 80 acres within the N1/2 NE1/4 Section 3, T.11N. R.23E., M.D.B.&M.[1]

The date of priority of Application 55841 and Permit 49447, Certificate 12096, is April 16, 1970, the same as that of the filing date of the base right, Permit 25543, Certificate 7557.[1]

II.

Applications 55840 and 55841 were timely protested by Vernon F. Bryan Inc., Annett Family Trust, and Milton E. Bacon dba Jubilee Ranch.

On May 6, 1991, Vernon F. Bryan Inc. protested both applications on the following grounds:

> "Being the fifth year of a drought there is water righted acres that have to be unirrigated. By diverting water to new ground with the water table lowering every year would increase the shortage of water to everyone already affected."

Therefore the protestant requests that the application be denied.[1]

On May 7, 1991, Annett Family Trust protested both applications on the following grounds:

> "Before transferring water to new ground there are permits denied on water righted ground. Being in the drought situation with the water table dropping no new transfers should be allowed."

Therefore the protestant requests that the application be denied.[1]

On May 24, 1991, Milton E. Bacon dba Jubilee Ranch protested both applications on the following grounds:

> "Currently in this region, there is water righted farming acreage which is unirrigatable because of a lasting serious drought. No permit should be issued to transfer any water to new ground that would continue to drop the present water table."

Therefore the protestant requests that the application be denied.[1]

FINDINGS OF FACTS

I.

Applications 55840 and 55841 are applications for permits to change water that has been previously appropriated from the Smith Valley Ground Water' Basin under Permits 49446 and 49447, respectively, and subsequently placed to beneficial use and on March 10, 1989 issued Certificates 12095 and 12096, respectively. Permits 49446 and 49447 are supplemental to each other and supplemental to surface water flows of the Walker River on the same 80 acres in the N1/2 NE1/4 Section 3, T.11N., R.23E., M.D.B.&M. The land is

currently being irrigated under both permits with a total combined duty not to exceed 320 acre-feet annually or not to exceed 4.0 acre-feet per acre per annum from any or all sources.

Applications 55840 and 55841 propose to remove these 80 acres from irrigation in Section 3 and propose to place 80 acres in the E1/2 SEI/4 Section 24 under irrigation if permits are issued for the applications.[1]

II.

The State Engineer finds that each protestant has a water right permit near the existing point of diversion (NW1/4 NE1/4 Section 3, T.11N, R-23E.) but that the protestants do not have water rights near the *proposed* point of diversion (SE1/4 SE1/4 Section 24, T.11N, R-23E.)[2]

III.

The State Engineer has annual water level measurements in Smith Valley that show water levels in the area of the

---

[2] Public records of the State Engineer.

owner of Record (*Protestant*)	*Permit*	*Certificate*	*Point of Diversion*
Milton E. Bacon (Milton E. Bacon dba Jubilee Ranch	19600	6029	NW NW 11-11N-23E
Vernon F. Bryan and Ruth A. Bryan (Vernon F. Bryan, Inc.)	20491	6464	NW SW 3-11N-23E
Norman T. Annett (Annett Family Trust)	27317	10104	NW SW 11-11N-23E

existing point of diversion (NW1/4 NE1/4 Section 3) have dropped between 30 and 46 feet in the last four years.[3]

The water levels in the area of the *proposed* point of diversion (SE1/4 SE1/4 Section 24) have dropped 18 feet in the last four years.[3]

IV.

The State Engineer finds that the existing place of use of these ground water rights is also irrigated by Walker River Claim Number 32, which has a priority date of 1890.[4]

The proposed place of use of these ground water rights is also irrigated by Walker River Claim Number 143, portions of which have priority dates of 1862, 1863, 1868 and 1878.[4]

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action.[5]

II.

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where:

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[3] Public records of the State Engineer, Smith Valley water level measurements.

[4] Public record of the State Engineer and *United States v. Walker River Irrigation District, et al.*, United States District Court for the District of Nevada, Equity No. C-125, as amended by the Order of the Honorable A.F. St. Sure, dated April 24, 1940, hereafter called Decree C-125.

[5] NRS Chapter 533.025 and NRS 533.030, subsection 1.

A. The proposed use conflicts with existing rights, or

B. The proposed use threatens to prove detrimental to the public interest.[6]

III.

The State Engineer concludes that to approve these applications would not conflict with the protestants' or any other water rights nor threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that because of earlier priority dates under Decree C-125 the proposed place of use under Application 55840 and 55841 would be entitled to more Walker River water and for longer periods of time during the irrigation season than the place of use under Permits 49446 and 49447. The State Engineer concludes that Applications 55840 and 55841 are filed to remain a supplemental source to Walker River water and thus, over the long term would result in less water being withdrawn from the groundwater basin.

RULING

The protests to Applications 55840 and 55841 are hereby overruled on the grounds that the issuing of these permits would not interfere with existing rights nor threaten to be detrimental to the public interest. Permits for Applications 55840 and 55841 will be approved and issued subject to the following conditions:

1. Receipt of the statutory permit fees.

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[6] NRS Chapter 533.370 subsection 3.

2. The well drilled under permits issued for the applications shall have a 2 inch opening to allow the measurement of water levels in the well.

3. A totalizing meter must be installed and maintained in the discharge of the well. Accurate measurements must be kept by month and sent quarterly to the State Engineer within 10 days from the end of each quarter(March 31, June 30, September 30, and December 31 of each year).

4. The existing well under Permits 49446 and 49447 shall be plugged as required by NAC 534.420 immediately upon completion of the new well.

Respectful submitted,

s/ R. Michael Turnipseed
R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/CB/pm

Dated this 10th day of
December, 1991.

APPENDIX D

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF LYON

DOUBLE J A LAND & LIVESTOCK CO.,
a Nevada Corporation,
Petitioner,

vs.

ROLAND B. WESTERGARD, State Engineer
Division of Water Resources, State of Nevada
Respondent.

NO. 6131

F I L E D
JUL 18, 1977
W. J. PAR
LYON COUNTY CLERK
s/ Marian Pinkerton
DEPUTY

DECISION AND JUDGMENT

This is an appeal by Petitioner, DOUBLE J A LAND AND LIVESTOCK CO., A Nevada Corporation, for judicial review of the ruling of Respondent, ROLAND B. WESTERGARD, State Engineer, in which said Respondent denied an application by Petitioner to appropriate certain underground water situated in Lyon County, Nevada. These proceedings were commenced pursuant to the provisions of Section 533.450 of the Nevada Revised Statutes.

On September 4, 1973, the Petitioner, DOUBLE J A LAND & LIVESTOCK CO. , filed Application # *27734* to appropriate ground water within Lyon County, Nevada, for irrigation and domestic use in the amount of 8.0 second feet. No protest to said Application was filed. A field investigation was held by the State Engineer's office on April 17, 1974. A report of the field investigation was filed by the State Engineer's office on May 15, 1974. On December 16, 1976, an administrative hearing was held by Respondent, State Engineer, on Petitioner's Application #27734, and a decision was rendered by said State Engineer on March 1, 1977, denying said Application. Thereafter, and on March 24, 1977, Petitioner filed Petitioner's Notice of Intent to file an appeal of said decision to the District Court.

Petitioner contends that the denial of the Application by Respondent was illegal, arbitrary and capricious because 1) it denied Petitioner's Application #27734 on the basis that it would impair existing water rights, a portion of which Petition by date of its application has priority over; 2) it is contrary to all evidence presented at the hearing held by the State Engineer showing that the availability of unappropriated water, the lack of infringement on existing water rights, lack of detriment to the public welfare, and the fact that the only complaint made by the Respondent to said application was the location of the point of diversion; 3) failure of the State Engineer to act on said application within the one-year period set forth in NRS 533.370(3).

The State Engineer's Findings of Fact, Conclusions of Law and Ruling dated March 1, 1977, and introduced in evidence as Exhibit *13* sets forth the following material Findings of Fact:

1. That Application #27734 was filed to appropriate water from an underground source within the Smith Valley

Artesian Basin Lyon County, Nevada, as designated and described by order of the State Engineer issued June 27, 1960.

2. Application #27734 is to appropriate water from an underground source.

3. The ground water reservoir water table has risen since the advent of farm land irrigation in Smith Valley and the water table is now substantially higher than under natural conditions before irrigation began. This rise in the water table has now nearly stabilized with water levels close to the surface than in many parts of Smith Valley.

4. The West Walker River is a gaining River below diversion canals in Smith Valley and serves as a drain for the irrigated farm land. There is an estimated 30,000 acre feet per year of return ground water and tail water flow to the West Walker River in Smith Valley.

5. The recharge from precipitation to the Smith Valley Ground Water Reservoir is estimated to be 17,000 acre feet per year. Any consumptive withdrawal in excess of the natural recharge from precipitation will either deplete the ground water reservoir or cause additional surface water to percolate into the ground water reservoir. Discharge by evapotranspiration by low value phreatophytes and discharging bare soil is estimated to withdraw 13,000 acre feet per year from the Smith Valley Ground Reservoir.

5. Pumpage of ground water for irrigation was estimated to be 20,000 acre feet in 1972 and 21,000 acre feet in 1976. Pumpage for irrigation is substantially less when surface water is available but is still estimated to average more than the 4,000 acre feet per year difference between recharge from precipitation and discharge by evapotranspiration by low-value phreatophytes and discharging bare soil.

6. In the relatively dry year of 1972, approximately one-half of the water applied for irrigation was consumed, that is, it did not return to either the surface or the ground water system.

7. Surface water appropriations and rights under Decree C-125 from the West Walker River System far exceed the average annual flow of 179,000 acre feet measured at Hoye Canyon from 1958 to 1972.

8. Ground water appropriations for irrigation from Smith Valley could be used to divert as much as 59,000 acre feet per year to irrigate 15,000 acres. Beneficial use has been proved and certificates of appropriation issued for 39,000 acre feet per year to irrigate 10,000 acres.

9. Large cones of depression have developed in areas of concentrated pumping in Smith Valley. From the spring of 1972 to one full year later in the spring of 1973, ground water levels had declined over 20 feet in areas of concentrated pumpage both south and north of the West Walker River in Smith Valley.

In Section 31,. T.12N., R.24E., M.D.B.&M., irrigation wells have had to be regulated and pumpage curtailed because of declining ground water levels.

In 1976, the water table had declined in some areas to the extent that pumps on domestic and irrigation wells have had to be lowered.

10. Applications to appropriate additional surface water from the Walker River Stream System have been denied on the grounds that their granting would tend to impair the value of existing rights, there is no unappropriated water in the source and the granting of the proposed appropriations would be detrimental to the public welfare.

11. Applications to appropriate underground water to irrigate additional land in Smith Valley have been denied on the grounds that their granting would tend to impair the value of existing rights.

12. Should Application #27734 be granted, and should subsequent development of ground water pursuant thereto detrimentally affect prior ground water rights, or surface rights as set forth under Decree C-125, and appropriated rights, the State Engineer is required by law to order withdrawals be restricted to conform to priority rights.

The relevant and material conclusions of law are as follows:

1. Existing water rights on West Walker River Stream System and the Smith Valley Artesian Basin far exceed flow in the West Walker River Stream System and recharge from precipitation to the Smith Valley Artesian Basin. To grant irrigation rights that consume large quantities of additional water would adversely affect existing rights and threaten to prove detrimental to the public welfare.

2. If Application #27734 were granted, additional lands would be irrigated and lands that are irrigated only part time would be irrigated more intensively and frequently. This would result in additional consumptive use by farm land irrigation. The additional withdrawals and consumption would remove water from the ground water reservoir which:

a. would not be replaced resulting in depletion of the ground water reservoir, or;

b. would be replaced by infiltrating surface water that otherwise would return to the stream system.

The additional withdrawals and consumption of underground water for irrigation would therefore conflict with existing rights and threaten to prove detrimental to the public welfare.

3. The State Engineer is authorized and directed to designate preferred uses of water within designated ground water areas such as the Smith Valley Artesian Basin. The consumptive use of additional ground water to irrigate additional land or to more intensely or frequently irrigate other land is not considered to be a preferred use of the limited water resources of the Smith Valley Artesian Basin.

4. The underground water applied for irrigation under Application #27734 would diminish return underground and tailwater flow to the West Walker River and so would adversely affect the prior rights as set forth in Decree C-125 and would conflict with appropriated rights on the Walker River Stream System and threaten to prove detrimental to the public welfare.

At the Administrative hearing on the subject Application held December 16, 1976 in Lyon County, Nevada, the applicant called Roy R. Rose, the manager of Double J A Land & Livestock Company and B. J. Vasey a registered professional engineer in Nevada and California who testified as to the existence of substantial ground water in the area covered by the subject Application and further testified that in their opinion there is unappropriated water at the proposed source and that the granting of the Application would not impair the value of existing rights nor be detrimental to the public welfare. This testimony was buttressed at the hearing before this Court. The State Engineer, in determining that the granting of this Application would adversely affect ground water and other existing water rights in the Smith Valley Basin, relied on his special expertise in rendering the decision and additionally relied heavily on Water Resources Bulletin

No. 43 Geohydrology of Smith Valley, Nevada, Exhibit No. 27. In addition, the State Engineer relied upon other public records and documents designated in the footnotes attached to the State Engineer's decision dated March 1, 1977, Exhibit No. 13. The two principal issues which have been presented to this Court for determination are (1) whether there was substantial evidence to support the finding of the State Engineer and the decision of the State Engineer to deny Application No. 27734 or whether the State Engineer in his ruling of March 1, 1977, acted in an illegal, arbitrary and capricious manner and as such abused his discretion, and (2) whether the failure of the State Engineer to act on Application No. 27734 within one year as set forth in NRS 533.370(3) was arbitrary and capricious and therefore should result in a reversal of the State Engineer's decision by this Court.

The law is well settled in the State of Nevada that the substantial evidence test is the test which applies to the judicial review of administrative proceedings. *Nevada Industrial Commission* vs. *Wells*, Advance Opinion No. 7830, filed October 30, 1975; *Johns* vs. *Gragson*, 89 Nev. 478 (1973), *North Las Vegas* vs. *Public Service Commission*, 83 Nev. 278 (1967). It is clear from a reading of these decisions that a trial court is not permitted to substitute its judgment for an administrators determination. As stated in the case of *North Las Vegas* vs. *Public Service Commission*, *supra*:

> "This Court long ago established the scope and basis of review by a lower Court in an administrative body's decision — thus, neither the trial court nor this court, should substitute its judgment for the administrator's determination. We should not pass upon the credibility of witnesses or weigh the evidence, but limit the review to a determination that

the board's decision is based upon substantial evidence."

This is clearly set forth in the provisions of NRS 233 B.140 (5) which states "5. The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The Court may reverse or modify the decision if substantial rights of appellant have been prejudiced because the administrative findings, inferences, conclusions and decisions are: a. in violation of Constitutional or statutory provisions, b. in excess of the statutory authority of the agency, c. made upon unlawful procedures, d. affected by other error of law, e. clearly erroneous in view of the reliable probative and substantial evidence on the whole record or f. arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion." In the case of *Consolidated Edison Company* vs.. *NLRB*, 305 US 197, at 229P the Supreme Court has held that substantial evidence means such relative evidence as a reasonable mind might accept as adequate to support a conclusion. In addition, under the provisions of Section 533.450 (9):

"9. The decision of the State Engineer's shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

And, as set forth in the case of *Smyth* v. *Jenkins* 299 Pacific 2d 819 (1956), which involved an appeal from a ruling of the Oregon State Engineer and which was quoted with approval by Judge Manoukian in the recent cases of *In the Matter of the Applications 28799, 28800, 28801 and 28802*, filed by Carson City for the waters of an underground source in Carson Valley, Douglas County, Nevada Case No. 6984 , in the Ninth Judicial District Court of the State of Nevada, in

and for the County of Douglas,the Oregon Supreme Court stated:

> "it is seldom, if ever, that a Court will interfere with the discretionary action of the State Engineer upon matters involving the administration of the water laws of the state and substitute its judgment for his. Judges are not super engineers."

Finally, the Nevada Supreme Court in the case entitled *In the Matter of the Waters of Bassett Creek*, 62 Nev. 456 (1945) stated that the findings of the State Engineer are entitled to great respect regarding the opinion of an expert upon a matter within the range of his special knowledge and expertise. Again, the Nevada Legislature recognized this legal proposition and clearly set it forth in NRS 233 B.123, subsection 4 which states: "notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge—the agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence."

In the instant case, the State Engineer in Exhibit No. 13 which is a decision and ruling of the State Engineer in regard to Application No. 27734, detailed through Findings of Fact and Conclusions his findings and the supporting documents for those findings respecting the affect that granting this Application would have on existing water rights in Smith Valley. In addition, at the time of the hearing of this matter before this Court a number of documents and maps were introduced relating to the flow of water in the Smith Valley Basin and of particular significance was Exhibit No. 27, "Water Resources Bulletin No. 43, Geohydrology of Smith Valley, Nevada," with special reference to the water use period 1953 to 1972." As set forth above, the burden of proof was on the petitioner to establish that the State Engineer acted

in an arbitrary, capricious or illegal manner in denying this Application. The thrust of the testimony presented by petitioner to establish this proposition was that there is sufficient ground water in the area of this Application and that in the opinion of Mr. Vasey, although he had made no independent measurements other than an observation of petitioner's drain ditches, additional pumping in this area as contemplated under the instant Application would not affect the existing water rights in the area nor have any substantial influence on the flow of water in the West Walker River. The second point relied upon by the Petitioner was that other Applications designated as Exhibits No. 14, 1S, 17, 18, 19, and 20 were subsequent in time to petitioner and therefore the granting of said Application was an abuse of discretion by the State Engineer. Tlie unrefuted testimony of the State Engineer and the evidence set forth in Exhibits No, 27 and 33 establish that there are two distinguishable ground water areas in Smith Valley. One is the Artesia Lake area and the second is the balance of the Smith Valley Artesian Basin. It appears that the State Engineer acted on the basis of sound engineering data in concluding that there was sufficient ground water in the Artesia Lake area for granting applications subsequent in time to petitioners which related to ground water in the Artesia area. In fact, under the provisions of NRS 533.370 (1) the State Engineer has a duty to approve applications to appropriate the public waters if there is sufficient water available for appropriation and there is no interference with existing water rights nor will the same be detrimental to the public welfare. It does not appear, however, that the granting of Applications to appropriate waters in the Artesia Lake area subsequent in time to petitioner's Application was an abuse of discretion on the part of the State Engineer when the evidence clearly establishes that the underground water movement in the Artesia Lake area is distinct and different from that in the

rest of the Smith Valley Artesian Basin. It is clear that Applications shown as Exhibits No. 17, 18, and 20 are within the Artesia Lake Basin and distinguishable from the instant Application. According to the testimony of Mr. Cardinalli, Application No. 28183 was an application for a supplemental water right for use on lands which are described in the place of Application No. 29184. Exhibit No. 16 was an application that changed the point of diversion of Application No. 27385 which had a priority date of April 2, 1973. It does not appear to this Court on the basis of the testimony that the granting of Application No. 28183, Exhibit 15 created an entitlement over and above the limit previously imposed. Thus, Exhibit 15 referred to a priority earlier in time than petitioners and it does not appear that the State Engineer abused his discretion in granting this Application. The State Engineer, in relying upon his knowledge of the Smith Valley Artesian Basin, including the Artesia Lake area and in reliance upon Exhibit 27 which is Bulletin No. 43, concluded that the granting of the subject Application would be detrimental to existing water rights. It is important to note that the Office of the State Engineer, did on June 27, 1960, enter an Order designating and describing the Smith Valley Artesian Basin of Lyon County. (Exhibit 11) By so designating the Basin, the State Engineer is legally permitted to consider preferred uses in an area where the resource is being depleted in acting on new water applications. The State Engineer clearly distinguished between the Artesia Lake area and the other portions of the Smith Valley Artesian Basin as being distinct and separate ground water areas. (See Transcript pps 122, 123)

The State Engineer testified that the West Walker River was fully appropriated at the time of the Application in the instant case. (Transcript, p. 123) The State Engineer concluded that the granting of this Application would adversely affect existing ground water rights in the Smith

Valley Basin where the approved appropriations exceeded the estimate of ground water that could be developed without adversely affecting said rights and further that if additional ground water were developed as would be the case if this Application were granted, return flow to the Walker River stream system could be adversely affected. (Transcript, 22 p. 129) This, in turn, would be detrimental to the prior established rights on the stream system. (Transcript, p. 129) In addition, with respect to the question which was raised by the petitioner with respect to the earlier granting of permits for drain ditches, the State Engineer testified that the water so appropriated was water for which the petitioner already had rights. (Transcript, pps. 131, 132, 133) Additionally, the State Engineer testified that the granting of this type of application respecting drain ditches could in no way interfere with prior rights or be detrimental to the public welfare.

The petitioner did not meet petitioner's burden in overcoming the evidence presented to the Court in support of these engineering principles.

Finally, petitioner has argued that certain water has been salvaged through the clearing of phreatophytes which the petitioner should be permitted to appropriate. The Nevada Supreme Court has held in the case of *Tonkin* v. *Winzell*, 27 Nev 88, 73 Pac 593, that downstream prior appropriators are entitled to have their water flow in its natural course to the headgate and not be deprived of its use for the benefit of a later claim upstream because the latter could save the evaporation. Therefore, even though there might be some clearing of land which freed water which theretofore had been feeding phreatophytes, this water was entitled to appropriation by downstream users who had prior rights as set forth in the case of *Southeastern Colorado Conservancy District* v. *Sheldon Farms, Inc.*, 529 Pac.2d 1321.

> "If it is shown that the water would ultimately return to the river, it is said to be part and parcel thereof and senior consumers are entitled to use it according to their decreed priorities."

In addition, the Court stated "if one ignores the technical difficulty of determining the amount of water salvaged, this proposal (allowing those clearing their phreatophytes to take the water salvaged) at first glance might seem reasonable and in the interest of the best use of water and related land resources. On closer scrutiny, it appears that if the water supply of existing rights is lost to encroaching phreatophytes and then taken by individuals eradicating the plant, the result would be chaos. The doctrine of prior appropriation, as we know it, would fall—the phreatophytes and the individual salvaging water would have the best right."

It appears, therefore, on the basis of testimony presented to the Court, that the downstream users on the West Walker River are prior appropriators and entitled to have this water flow in its natural course. It does not appear that the State Engineer abused his discretion in refusing to grant an Application to secure water which may have been freed by virtue of the clearing of phreatophytes when that water should naturally flow to the prior appropriators.

It appears on the basis of the foregoing that the State Engineer did not act in an arbitrary or capricious manner in denying the Application of petitioner and that there is substantial evidence to support the findings of the State Engineer in denying said Application.

The Court was impressed by the fact that there appears to be substantial ground water in the area which is the subject of petitioner's Application. Because of the testimony respecting the existence of such ground water, the Court might well have

reached a different conclusion if the law of this State permitted this Court to substitute its judgment for the judgment of the State Engineer. However, as indicated above, it is clear that the law of the State of Nevada requires that this Court simply determine if there is substantial evidence to support the decision of the State Engineer. The law of the State further requires that this Court not substitute its judgment for the judgment of the State Engineer. Therefore, although there may be some conflict in testimony between the Engineer representing petitioner and the State Engineer and his staff, it does appear to the Court that there is substantial evidence to support the findings of the State Engineer in denying the instant Application. It appears that the State Engineer, through testimony presented to the Court, and the documentary evidence presented to the Court, established reasonable distinctions between the Artesia Lake Basin area and the balance of the Smith Valley Basin, and further established reasonable distinction between the granting of rights to construct drain ditches and the granting of an application to appropriate underground water) and further established that the West Walker River was fully appropriated (this confirmed by the Engineer representing Petitioner), and further that both surface waters and ground waters had and were fully appropriated in Petitioner's area. Even though it appears to the Court that a high water table exists in the area the subject of this Application, the Court is not permitted by law to substitute its judgment for the judgment of the State Engineer, but is mandated by law to determine if there was substantial evidence to support the finding of the State Engineer. Because of these constraints placed upon the Court, this Court finds that there was substantial evidence to support the findings of the State Engineer and that the State Engineer did not abuse his discretion or act in an arbitrary or capricious

manner in denying the Application of Petitioner to appropriate underground water.

The second point raised by Petitioner is that the State Engineer failed to act on Petitioner's Application within the usual one-year period set forth in NRS 533.370. NRS 533.370 (3) provides:

> "The State Engineer shall either approve or reject each application within 1 year from the final date for filing protest; but: (a) Action can be postponed by the state engineer upon written authorization to do so by the applicant or, in case of a protested application, by both the protestant and the applicant; and (b) In areas where water supply studies are being made or where court actions are pending, the state engineer may withhold action until such time as it is determined unappropriated water or the court action becomes final."

It is clear from the testimony that the primary reason that the State Engineer did not act on the instant Application within the one year time period was because he was waiting for the completion of the cooperative study between the Nevada Division of Water Resources and the United States Geological Survey. That study was finally completed and resulted in Bulletin #43, herein above referred to as Exhibit No. 27. It is apparent to this Court that that study was very beneficial in a final determination in the instant action and provided engineering data which was essential to a determination in the instant action. Accordingly, since this is one of the recognized exceptions under the provisions of NRS 533.370 for a delay in the State Engineer's decision, the Court concludes that the State Engineer did not abuse his discretion in rendering a decision beyond the one-year time period prescribed in NRS 533.370.

For the foregoing reasons, the Court concludes that the Petitioner has failed to satisfy its burden of proof required under the provisions of NRS 533.450 in establishing the State Engineer's ruling and decision in the instant action was arbitrary, capricious or an abuse of the Engineer's discretion.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Petitioner's appeal be and the same hereby is dismissed, and Respondent's decision dated March 1, 1977, as the same relates to Petitioner is affirmed.

DATED this 18th day of July, 1977.

s/ Howard D. McKibben
DISTRICT JUDGE

APPENDIX E

APPLICABLE STATUTES

The following Nevada Revised Statutes are involved in this case:

NRS 533.040. Water used for beneficial purposes to remain appurtenant to place of use; exceptions.

All water used in this state for beneficial purposes shall remain appurtenant to the place of use; provided:

1. That if for any reason it should at any time become impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this chapter, and not otherwise, without losing priority of right heretofore established;. . .

NRS 533.360. Notice of application: Contents; publication; mailing required under certain circumstances.

1. Except as otherwise provided in NRS 533.345 and subsection 3 of NRS 533.370, when an application is filed in compliance with this chapter the state engineer shall, within 30 days, publish or cause to be published for a period of 4 consecutive weeks in a newspaper of general circulation and printed and published in the county where the water is sought to be appropriated, a notice of the application, which sets forth:

(a) That the application has been filed.
(b) The date of the filing.
(c) The name and address of the applicant.

(d) The name of the source from which the appropriation is to be made.
(e) The location of the place of diversion.
(f) The purpose for which the water is to be appropriated.

The publisher shall add thereto the date of the first publication and the date of the last publication.

2. Proof of publication must be filed within 30 days after the final day of publication. The state engineer shall pay for the publication from the application fee. If the application is canceled for any reason before publication, the state engineer shall return to the applicant that portion of the application fee collected for publication.

NRS 533.365. Interested person may file verified protest with state engineer against granting of application; notice to applicant of protest; rules of practice for hearing; technical rules of evidence do not apply.

1. Any person interested may, within 30 days from the date of last publication of the notice of application, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

2. On receipt of a protest, the state engineer shall advise the applicant whose application has been protested of the fact that the protest has been filed with him, which advice shall be sent by certified mail.

3. The state engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a

full understanding of the rights involved. The state engineer shall give notice of the hearing by certified mail to both the applicant and the protestant. The notice must state the time and place at which the hearing is to be held and must be mailed at least 15 days before the date set for the hearing.

4. The state engineer shall adopt rules of practice regarding the conduct of such hearings. The rules of practice must be adopted in accordance with the provisions of NRS 233B.040 to 233B.120, inclusive, and codified in the Nevada Administrative Code. The technical rules of evidence do not apply at such a hearing.

NRS 533.370(3). Approval or rejection of application by state engineer: Conditions; procedure.

3. Except as otherwise provided in subsection 5, where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for. Where a previous application for a similar use of water within the same basin has been rejected on these grounds, the new application may be denied without publication.

NRS 533.450. Orders and decisions of state engineer subject to judicial review; procedure; appeals; appearance by attorney general.

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision

relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

2. The proceedings in every case shall be heard by the court, and shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced.

3. No such proceedings may be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interest, has been served upon the state engineer, personally or by registered or certified mail, at his office at the state capital within 30 days following rendition of the order or decision in question. A similar notice shall also be served personally or by registered or certified mail upon the person or persons who may have been affected by such order or decision.

4. Where evidence has been filed with, or testimony taken before, the state engineer, a transcribed copy thereof, or of any specific part of the same, duly certified as a true and correct transcript in the manner

provided by law, shall be received in evidence with the same effect as if the reporter were present and testified to the facts so certified. A copy of the transcript shall be furnished on demand, at actual cost, to any person affected by such order or decision, and to all other persons on payment of a reasonable amount therefor, to be fixed by the state engineer.

5. A bond shall not be required except when a stay is desired, and the proceedings provided for in this section are not a stay unless, within 5 days following the service of notice thereof, a bond is filed in an amount to be fixed by the court, with sureties satisfactory to such court, conditioned to perform the judgment rendered in such proceedings.

6. Costs shall be paid as in civil cases brought in the district court, except by the state engineer or the state.

7. The practice in civil cases applies to the informal and summary character of such proceedings, as provided in this section.

8. Appeals may be taken to the supreme court from the judgment of the district court in the same manner as in other civil cases.

9. The decision of the state engineer shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.

10. Whenever it appears to the state engineer that any litigation, whether now pending or hereafter brought, may adversely affect the rights of the public in water, he shall request the attorney general to appear and protect the interests of the state.